

Appeal from a decision of the Alaska State Office, Bureau of Land Management, allowing in part, and rejecting in part, homestead entry application and final proof. AA-8451.

Affirmed.

1. Federal Employees and Officers: Authority to Bind Government

Where a homestead entryman alleges that, based on the advice of a BLM employee, he refrained from filing a private contest pursuant to 43 CFR 4.450-1 against an entry adverse to his own, estoppel will not lie against the Government where the entryman is unable to show that he was ignorant of the true facts.

2. Alaska: Homesteads -- Applications and Entries: Priority -- Homesteads (Ordinary): Applications -- Homesteads (Ordinary): Lands Subject To

When BLM has adjudicated a homestead entry application by allowing it, the rights of the applicant are deemed to relate back to the date of filing of the application and the land embraced by such application is thereby included within an allowed entry. Any applications filed after such date for the same land must be rejected.

APPEARANCE: John R. Dean, Anchorage, Alaska, pro se.

OPINION BY ADMINISTRATIVE JUDGE KELLY

John R. Dean appeals from a decision dated May 3, 1985, by the Alaska State Office, Bureau of Land Management (BLM), allowing in part, and rejecting in part, his homestead entry AA-8451.

On August 14, 1973, Dean filed homestead entry application AA-8451 for 100 acres of land in Alaska. On November 1, 1973, he amended the application by adding another 40 acres. The amended application embraced the following described land:

Seward Meridian, Alaska
 T. 20 N., R. 9 E.
 Sec. 28 N 1/2 NW 1/4, W 1/2 SW 1/4 NW 1/4
 Sec. 29 SE 1/4 NE 1/4

On December 23, 1974, Dean filed final proof of compliance with the homestead laws, even though the entry had not yet been allowed. Dean's application conflicted with parts of two prior applications for homestead entry: AA-8196 filed by Glenn W. Price on October 24, 1972, and AA-8213, filed by Deborah L. Angel on November 13, 1972. Price's application described 160 acres as follows:
 Seward Meridian, Alaska

T. 20 N., R. 9 E.
 Sec. 28 N 1/2 NW 1/4
 Sec. 29 E 1/2 NE 1/4

Angel's application described 160.45 acres as follows:

Seward Meridian, Alaska
 T. 20 N., R. 9 E.
 Sec. 28 N 1/2 NW 1/4, W 1/2 SW 1/4 NW 1/4
 Sec. 29 Lot 2, S 1/2 SE 1/4 NE 1/4

By decision of December 8, 1976, BLM rejected Dean's application for homestead entry and his final proof. Citing Albert A. Howe, 26 IBLA 386 (1976), BLM concluded that the prior-filed applications segregated the lands from appropriation and created prior existing rights.

In John R. Dean, 34 IBLA 330 (1978), the Board ruled that the rejection of Dean's application and final proof was premature. Specifically, we held that rejection of a homestead application merely because there are prior-filed homestead applications for the same land is improper and premature where no action has been taken on the conflicting applications. We held further that if a prior-filed application is allowed, the land comes within an allowed entry of record and a junior application must be rejected thereafter. However, if the prior application is rejected or withdrawn before it is allowed, it no longer bars allowance of a junior application. John R. Dean, *supra* at 336.

On October 1, 1981, BLM allowed the Price entry (AA-8196) for the 160 acres described therein. The Price entry was cancelled by decision of an Administrative Law Judge dated January 2, 1985. Price did not appeal. In the decision presently before the Board, BLM rejected so much of Dean's application as conflicted with Price's allowed entry. BLM's decision recites in pertinent part:

The IBLA decision John R. Dean, 34 IBLA 330, 336 (1978) states that "if a prior application is allowed the land becomes within an entry and conflicting applications must be rejected." An application must be rejected due to the doctrine of relation back. When an entry is allowed, the rights of the applicant are deemed to go back to the date of the original application. This segregates the land as of the date of application and renders void intervening claimants. See John R. Dean, 34 IBLA 330 (1978); Raymond L. Gunderson, 71 I.D. 477 (1964). When Glenn W. Price's entry was allowed on October 1, 1981, it segregated the lands as of the date of his application, October 24, 1972, and cut off the rights of John R. Dean. Because Mr. Price's rights attached on the date of his application, the lands were unavailable when Mr. Dean applied for them on August 14, 1973. Therefore, the application to enter and final proof of John R. Dean, AA-8451, must be rejected where they were in conflict with Mr. Price's allowed entry. AA-8451 is rejected in part as to the 120 acres of land described as follows:

Seward Meridian, Alaska.
T. 20 N., R. 9 E.
Sec. 28, N 2 NW 4
Sec. 29, SE 4 NE 4

In its decision, BLM states, as a second reason for partially rejecting Dean's entry and final proof, that Dean failed to file a private contest under 43 CFR 4.450-1 so as to obtain a preference right against Price. The decision states further that the Angel application (AA-8213) "was invalidated on October 19, 1978, by a decision of the Office of Hearings and Appeals." No appeal was filed and BLM canceled the Angel entry on March 8, 1979. Consequently, BLM's decision allowed Dean's entry as to 20 acres not in conflict with Price's entry:

Because Ms. Angel's application was cancelled, Mr. Dean can be allowed entry on those lands which were not in conflict with Mr. Price's allowed entry. Therefore, Mr. John R. Dean's homestead entry, identified by the serial number AA-8451, is hereby allowed in part for the following described land:

Seward Meridian, Alaska.
T. 20 N., R. 9 E.
Sec. 28, W2SW4NW4.

Containing 20.00 acres, as shown on plat of survey, accepted February 8, 1960.

In his statement of reasons, Dean asserts that he refrained from filing a private contest against Price based on advice he received from a BLM employee. Dean argues that his letter of February 13, 1974, advising BLM he moved onto the land on February 12, 1974, constitutes a notice of settlement,

and asserts that the Board's decision in John R. Dean, *supra*, stated if he had filed such notice instead of an application for entry he would have no problem. Dean also asserts that he fully complied with the settlement and cultivation requirements of the homestead law and that his final proof should be allowed as to all 140 acres for which he originally applied.

[1] Dean's first argument on appeal is that he did not file a private contest against the Price entry under 43 CFR 4.450-1 because he relied upon the advice of a BLM employee. ^{1/} He asserts a BLM employee explained that the proper way to proceed would be to allow BLM to inspect the Price entry on the 180th day following the allowance of the entry to determine whether Price had built a habitable dwelling. Dean states this was done and BLM found Price had not moved on the land.

In essence Dean is asserting that BLM is estopped from the partial rejection of his homestead application. We must reject this argument. It is well settled that in the absence of a showing of affirmative misconduct by a responsible Federal employee, an estoppel will not lie against the Government because of reliance on erroneous or inadequate information given. United States v. Ruby Co., 588 F.2d 697 (9th Cir. 1978); Ward Petroleum Corp., 93 IBLA 267 (1986). The Board's earlier decision, John R. Dean, 34 IBLA at 336, clearly informed Dean that:

[r]egulation 43 CFR 2091.1 requires rejection of an application if land is in an "allowed entry or selection of record." Therefore if a prior application is allowed the land becomes within an entry and conflicting applications must be rejected.

The record indicates that on August 28, 1981, Dean received BLM's notice that Price was being allowed entry. An essential element of estoppel is that the party asserting it must be ignorant of the true facts. Tom Hurd, 80 IBLA 107 (1984). That element is missing in this case. Furthermore, it is not clear what Dean might have gained had he filed a private contest. The only right acquired by one who successfully contests a homestead entry is the preference right for 30 days, under 43 U.S.C. @ 185 (1982) (repealed effective October 22, 1986 by sec. 702 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2787) to enter the lands. If between the time of the homestead entry and the initiation of a successful contest the land has been withdrawn, the successful contestant will have 30 days after the land is restored to public entry to exercise the preference right. McLaren v. Fleischer, 256 U.S. 477 (1921).

^{1/} That regulation provides:

"[A]ny person * * * who seeks to acquire a preference right pursuant to the Act of May 14, 1880, as amended, (43 U.S.C. 185), * * * may initiate proceedings to have the claim of title or interest adverse to his claim invalidated for any reason not shown by the records of the Bureau of Land Management."

The lands in question in this case are the subject of a State selection. Thus, a successful contestant would be faced with the possibility that the land might never become available for disposition.

Dean's second argument is that his letter of February 13, 1974, advising BLM he moved onto the land on February 12, 1974, constitutes a notice of settlement and thus under our decision in John R. Dean, supra, his entry and final proof should be allowed. We have carefully reviewed that decision and find no support for Dean's argument. 2/

[2] Lastly, Dean argues he has fully complied with the settlement and cultivation requirements and his final proof for the original 140 acres applied for should be allowed. Where a prior homestead application is allowed, (in this case the Price application) the land becomes within an entry and conflicting applications must be rejected. 43 CFR 2091.1. BLM's adjudicative action of allowing the Price entry on October 1, 1981, related back to the date of Price's original application, October 24, 1972, with the consequence that the land was not open to Dean's application or settlement between those dates. See John R. Dean, supra at 335. Therefore, BLM properly rejected Dean's application as to the lands in conflict with the Price application.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

John H. Kelly
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Bruce R. Harris
Administrative Judge.

2/ In John R. Dean, 34 IBLA 330, 339 (1978), reference was made to the fact Dean did not file a notice of settlement but did file homestead application. This reference, however, was in the context of a discussion regarding credit for time spent for residence and cultivation and has no bearing on any of the issues in the case presently before the Board.

